



No. 92-207

In The
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER V. PADILLA, ET AL.,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**AMICUS CURIAE BRIEF OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENTS**

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, AR 72201
(501) 371-9131

February 8, 1993

Attorney for Amicus Curiae

QUESTION PRESENTED BY PETITIONER

Whether membership in a joint venture to transport drugs gives co-conspirators a privacy or property interest entitling them to challenge the investigatory stop of one of the members of the conspiracy, and the subsequent search of the car he was driving.

TABLE OF CONTENTS

Question Presented by Petitioner	1
Table of Contents	3
Table of Authorities	4
Interest of Amicus	6
Constitutional Provisions Involved	7
Summary of the Argument	8
Argument:	
I. Introduction	9
II. What is a "reasonable expectation of privacy"?	11
A. Has the defendant "exhibited an actual (sub- jective) expectation of privacy"?	12
B. Is the expectation "one that society is pre- pared to recognize as 'reasonable'"?	13
1. Cases from this Court	13
2. Privacy rights, property rights, or both?	16
3. Facts of this case	18
4. Property law and "common understand- ings"	20
III. Refusal to grant standing under these facts will cause wholesale violations of the Fourth Amend- ment in potential conspiracy cases; there will be no deterrence of the police from violating the Fourth Amendment in the name of effective law enforcement.	23
IV. There is no "drug case" exception to the Fourth Amendment.	27
Conclusion	29

TABLE OF AUTHORITIES

CASES:

<i>Alderman v. United States</i> , 394 U.S. 165 (1969) . . .	15,16,26
<i>Almeida-Sanchez v. United States</i> , 413 U.S. 266 (1973) . . .	22
<i>Brown v. United States</i> , 411 U.S. 223 (1973)	16,28
<i>California v. Carney</i> , 471 U.S. 386 (1985)	21n
<i>California v. Ciraolo</i> , 476 U.S. 207 (1986)	13
<i>Cardwell v. Lewis</i> , 417 U.S. 583 (1974)	17,21n
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971)	22
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	22
<i>Elkins v. United States</i> , 364 U.S. 206 (1960)	25
<i>Illinois v. Andreas</i> , 463 U.S. 765 (1983)	28
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	8,10,11,12,15,17,18
<i>Jones v. United States</i> , 362 U.S. 257 (1960)	15,15n
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965)	25
<i>Mancusi v. DeForte</i> , 392 U.S. 364 (1968)	15
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	25
<i>Minnesota v. Olson</i> , 495 U.S. 91 (1990)	11,14
<i>New York v. Class</i> , 475 U.S. 106 (1986)	21n
<i>Olmstead v. United States</i> , 277 U.S. 436 (1928)	26,26n
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1978)	10,14,15n,16
<i>Rawlings v. Kentucky</i> , 448 U.S. 98 (1980)	13
<i>Soldal v. Cook County, Illinois</i> , 113 S.Ct. 538 (1992) . . .	17
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	25
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975) . . .	22
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	24
<i>United States v. Dunn</i> , 480 U.S. 294 (1987)	13
<i>United States v. Jacobsen</i> , 466 U.S. 107 (1984)	15,18,28,28n
<i>United States v. Jeffers</i> , 342 U.S. 48 (1951)	15,16
<i>United States v. Karo</i> , 466 U.S. 705 (1984)	9,28
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976) . .	21n
<i>United States v. Padilla</i> , 960 F.2d 854 (9th Cir.1992)	12,13,13n,18,19,19n

<i>United States v. Payner</i> , 447 U.S. 727 (1980)	24
<i>United States v. Place</i> , 462 U.S. 696 (1983)	18
<i>United States v. Ross</i> , 456 U.S. 798 (1982)	22
<i>United States v. Salvucci</i> , 448 U.S. 83 (1980)	15
<i>United States v. White</i> , 401 U.S. 745 (1971)	13
<i>Walter v. United States</i> , 447 U.S. 649 (1980)	18
<i>Warden v. Hayden</i> , 387 U.S. 294 (1967)	11,17
<i>Weeks v. United States</i> , 232 U.S. 383 (1914)	25

CONSTITUTIONAL PROVISIONS:

Fourth Amendment, U.S. Constitution	7,passim
---	----------

STATUTES:

18 U.S.C. § 242	27
U.S.S.G. § 2D1.1(c)(3)	11n
Ariz. Rev. Stat. § 13-1303	27
ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.1(5) (Official Draft 1975)	10n
MODEL PENAL CODE §§ 212.2-212.3 (Proposed Official Draft 1962)	27

OTHER AUTHORITIES:

8 AM.JUR. 2d, <i>Bailments</i> § 76 (Rev.ed.1980)	21
63A AM.JUR.2d, <i>Property</i> § 37 (1984)	20
Amsterdam, <i>Perspectives on the Fourth Amendment</i> , 58 MINN.L.REV. 349 (1974)	13
W. Blackstone, <i>Commentaries</i> , Book 2, ch. 1	14
73 C.J.S. <i>Property</i> § 30 (1983)	20
1 HALL, <i>SEARCH AND SEIZURE</i> § 6:18 (2d ed.1991) . . .	10n
8A WORDS & PHRASES, <i>Constructive Possession</i> 582-83 (1951) & 194-200 (Supp.1992)	21

In The
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER V. PADILLA, ET AL.,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**AMICUS CURIAE BRIEF OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS CURIAE

This *amicus* brief is filed with the consent of the parties.

The National Association of Criminal Defense Lawyers, Inc.. (NACDL) is a non-profit voluntary association

of criminal defense lawyers founded in 1958 with its office in Washington, D.C. The American Bar Association recognizes NACDL as an affiliate organization, and NACDL has full representation on the ABA House of Delegates. Among its purposes and missions stated in its bylaws are: "to promote the proper administration of justice," "to ensure justice and due process for persons accused of crime," and to promote "continued recognition and adherence to the Bill of Rights [which is] necessary to sustain the quality of the American system of justice."

NACDL has over 7,100 lawyer members in all 50 states, Puerto Rico, Guam, the Mariana Islands, Canada, and some other common law countries. NACDL has 62 state and local affiliates from Hawaii to Florida and even in Canada and approximately 27,000 affiliate members. Counsel for NACDL is a member of its Board of Directors and the author of a treatise on the Fourth Amendment.

In this case, *amicus* files this brief in support of the respondents to argue the policies underlying the Fourth Amendment issues in this case.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

SUMMARY OF THE ARGUMENT

The Government has too simply stated its Question Presented. Rather, the question should be whether a co-conspirator *can* have standing under the facts of this case. This case presents the issue fairly well, because respondents Xavier Padilla and the Simpsons had dominion and control over the vehicle through a person acting at their direction sufficient for constructive possession and a privacy interest to arise even though that were not in physical possession.

The core issue in any standing inquiry is whether the person challenging the search and seizure had an expectation of privacy in the place searched or the thing seized. "[T]he Fourth Amendment protects people not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). There are two prongs: a subjective prong and an objective prong. *Id.* at 361 (HARLAN, J., concurring). The first is easy to establish or disprove based on what the accused did to conceal the object seized. The second is more difficult, and it derives from an analysis of property law, concepts of privacy, and common understandings of the relationships between people and their property. The Court cannot simply focus on the fact that a car was involved. Much more is required under the Fourth Amendment and society's notions of its privacy.

It is clear from the cases of this Court that these concepts all work together to bear on the result. First, society recognizes that people put things in the locked trunks of their cars to secrete and protect them from interlopers, and they do not expect the police to stop and search their trunk without cause. This is a common understanding of basic

privacy in American society. Second, a person can be in constructive possession of property by his intention and exercise of control and dominion over an object not in his actual possession at that time. That is precisely the holding of the court of appeals under the facts of this case.

If this Court refuses to find standing under these facts, it will stamp its imprimatur on wholesale violations of the Fourth Amendment which will inevitably develop. The police will have incentive to violate it rather than follow it in the name of effective law enforcement with the sanction of this Court. The police need to be deterred from violating the Fourth Amendment and not given any incentive to violate it.

There can be no drug case exception to the Fourth Amendment as the Government seems to suggest in its brief. *United States v. Karo*, 466 U.S. 705, 717 (1984).

ARGUMENT

I.

INTRODUCTION

Amicus submits that the issue as stated by the Government is too simply stated. "[M]embership in a joint venture" or simply being a "co-conspirator" does not *ipso facto* create standing; the nature of the relationship between the joint venturers or conspirators as shown by the facts of the case and their expectation of privacy as shown by what they were doing is what makes standing. The question here should be "*can* a co-conspirator have stand-

ing."¹ The key to the law of standing in all the cases from this Court has been whether the person challenging the search had an expectation of privacy in the place searched.² This is a substantive question under the Fourth Amendment. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). If there is an expectation of privacy, the person has standing. He neither need be present nor in immediate possession of something to challenge a search if he actually has an expectation of privacy. A co-conspirator, under the proper circumstances, should be able to claim standing if the nature of his relationship with the property and his co-conspirators is such that he has dominion and control over the vehicle through his agent. This Court has never faced this question, but this is such a case. This case presents an opportunity for principled analysis of the *Katz* expectation of privacy test. Without such an analysis, the conse-

¹ The Government's address book hypothetical from page 18 n.6 of its Brief demonstrates the simplistic view it seems to take. More facts are required to determine whether another person would have standing in the address book. A co-conspirator may or may not have standing in its hypothetical situation, depending on the facts of the case. The example given by the Government, with no more facts, is more a rhetorical question rather than a hypothetical.

² It has been argued elsewhere that standing should extend to co-conspirators and others because of their status without regard to all the facts of the case. ALI MODEL CODE OF PRE-ARREST PROCEDURE § 290.1(5) (Official Draft 1975). In fact, many states as a matter of policy have decided that certain classes of defendants are entitled to standing as a matter of state law independent of the Fourth Amendment. 1 HALL, SEARCH AND SEIZURE § 6:18 (2d ed.1991).

quences could be disastrous for individual liberty in this nation--this case reaches far beyond the parties of this case.

Amicus also urges to Court to not be influenced by the fact this is a drug case involving a massive quantity of cocaine and an incredible potential sentence.³ The fundamental constitutional right involved in this case is too precious to be the victim of even a subconscious aversion to the level of the crime. But, the level of crime underscores *amicus*' deterrence argument in Point III, *infra*.

II.

WHAT IS A "REASONABLE EXPECTATION OF PRIVACY"?

In the context of standing, the Court should not be seduced into simply looking at the object of the initial seizure; *i.e.*, a vehicle driving on a highway with a sole occupant. Instead, the Court must focus on the relationship created and understood between the people involved in the conspiracy because "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Further, "[w]hat [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* *Katz* made it clear that an analysis of property interests does not control Fourth Amendment analysis, but they do remain important. *Id.* at 353, citing *Warden v. Hayden*, 387 U.S. 294, 304 (1967). See also *Minnesota v. Olson*, 495 U.S. 91, 96 n.5 (1990).

³ U.S. Sentencing Guidelines § 2D1.1(c)(3) dictates that this is a level 38 offense. The Government contends that Xavier Padilla is a "kingpin" which increases the level by 4 points. He is thus facing a potential sentence of 360 months to life.

There are two prongs to analyzing the reasonable expectation of privacy in any Fourth Amendment case: whether the defendant "exhibited an actual (subjective) expectation of privacy"; and whether the expectation is "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (HARLAN, J., concurring). The first question is usually easy to determine; the latter is not always easy.

A. HAS THE DEFENDANT "EXHIBITED AN ACTUAL (SUBJECTIVE) EXPECTATION OF PRIVACY"?

It is evident from this record that the co-conspirators did have an actual, subjective expectation of privacy in the vehicle with the 560 pounds of cocaine in it. The Court of Appeals stated, Pet.Cert. at 10a, *United States v. Padilla*, 960 F.2d 854, 859 (9th Cir.1992):

In ruling that all the defendants had standing, the district court determined that they were clearly participants in a joint venture. The defendants were "involved in the joint control over a very sophisticated operation involving ownership in Mexico or Columbia, [and] transportation aspects of the business [were] controlled by these people, and I think under those circumstances they have standing." With respect to [the Simpsons and Xavier Padilla], we agree. Not only was there a formal arrangement for the transportation, the defendants shifted responsibility for the contraband between each other at various stages of the relay. (first two brackets in original; third added)

The court then recounted the facts in detail about the nature of the role of the Simpsons and Xavier Padilla in this conspiracy and how they "demonstrated joint control and

supervision over the drugs and vehicle and engaged in an active participation in a formalized business arrangement [sufficient to give them] standing to claim a legitimate expectation of privacy in the property searched and the items seized." *Id.* at 12a-14a, 960 F.2d at 860-61 (bracketed material added).⁴

This subjective prong should usually be easy to establish, but it can be quite elusive, and, in the extreme, it can even become meaningless. Justice Harlan recognized this himself in *United States v. White*, 401 U.S. 745, 784 (1971) (HARLAN, J., dissenting). *Accord*: Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN.L.REV. 349, 384-85 (1974) (If the Government announced that all rights were suspended and wholesale searches began occurring, could the Government create a subjective expectation of no privacy.) This case does not present the extreme, except maybe to the extent suggested by Point 2.C. of the Government's brief, addressed herein at Point IV, *infra*. If the Government wins, the extreme example from Amsterdam will occur. *See* Point III, *infra*.

At bottom, the Court must look to whether the defendant "took normal precautions to maintain his privacy." *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *United States v. Dunn*, 480 U.S. 294, 303 (1987). In this case, the defen-

⁴ As to two other defendants, the Court of Appeals remanded for further factual development; Pet.Cert. at 14a-15a, 960 F.2d at 861; and as to a third held he had no standing because he "demonstrated no active control or supervision over the drugs or the vehicle involved in this conspiracy." *Id.* at 15a-16a, 960 F.2d at 861-62.

dants wrapped and concealed the cocaine in the locked trunk of a vehicle intended to transport it, and they were engaged in an elaborate plan to have the vehicle driven from Mexico first to Tempe, Arizona, where it would be picked up by two of the co-conspirators (Xavier's wife and brother) to go on to California. The cocaine was not sitting in the backseat exposed to the world; rather, it was well wrapped, concealed, and securely locked in the trunk. They did everything normally possible to maintain their privacy short of welding the trunk shut, which is hardly a normal precaution to preserve privacy.⁵ Therefore, this prong of *Katz* is, as the usual case, easily satisfied.

B. IS THE EXPECTATION "ONE THAT SOCIETY IS PREPARED TO RECOGNIZE AS 'REASONABLE'?"

1. Cases from this Court

This is the objective prong, and it is "rooted in 'understandings that are recognized and permitted by society'"; *Minnesota v. Olson*, 495 U.S. at 100, quoting *Rakas*, 439 U.S. at 144 n.12; or, to a fair extent, property law. Further, the *Rakas* Court said in n. 12:

Legitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, *Commentaries*, Book 2, ch. 1, and one who owns or law-

⁵ Indeed, a trunk welded shut would probably create reasonable suspicion in and of itself.

fully possesses or *controls* property will in all likelihood have a legitimate expectation of privacy by virtue of his *right to exclude*. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected both in *Jones, supra*, and *Katz, supra*. But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of privacy interests protected by that Amendment. (emphasis added)

The Court has long recognized that a person does not have to be present at the time of a search and seizure to have standing as long as he or she has an expectation of privacy. See, e.g., *United States v. Jacobsen*, 466 U.S. 107, 114 (1984) (defendant had standing to challenge search and seizure of package he put in the hands of Federal Express; but he lost on the merits of the search); *Alderman v. United States*, 394 U.S. 165 (1969) (absent homeowner could object to illegally monitored conversations of others monitored from his home); *Mancusi v. DeForte*, 392 U.S. 364, 368-69 (1968) (absent defendant had standing to challenge a search of his desk and file cabinet in a common office area); *Jones v. United States*, 362 U.S. 257 (1960) (overruled on other grounds *United States v. Salvucci*, 448 U.S. 83 (1980)⁶) (absent defendant

⁶ While *Jones* was overruled in part by *Salvucci*, and *Jeffers* by *Rakas*, it is clear that both cases would be decided the same under the analysis of *Rakas*, 439 U.S. at 142 n.10, 143-44 n.12,

had standing to challenge search of friend's apartment where he had access and kept contraband); *United States v. Jeffers*, 342 U.S. 48, 52 (1951) (overruled on other grounds *Rakas v. Illinois*, *supra*, see note 6, *supra*) (absent defendant stored drugs in his aunt's hotel room).

In *Alderman v. United States*, 394 U.S. at 171, and *Brown v. United States*, 411 U.S. 223, 230 n.4 (1973), the Court did state that the mere existence of a conspiracy did not create standing. The issue presented here was not properly preserved by the defendants in *Brown*. Factually, however, *Brown* is far different: those defendants alleged no possessory interest in the stolen goods or the place searched, they sold the stolen goods to Knuckles two months prior to the search, they were nowhere around the day of the search, they were not charged with a possessory offense, and the conspiracy charge itself covered the time period up to the day before the search. *Id.* at 229. The converse of each of these factors is present in this case because of the immediacy of the Simpsons' and Xavier Padilla's right to control the car and its movements.

The objective expectation of privacy is not defeated just because this case involves a large amount of an illegal drug. See text accompanying note 3, *supra*. If so, standing in drug cases would cease to be an issue and a huge exception to the Fourth Amendment would have to be created. See Point IV, *infra*.

2. Privacy rights, property rights, or both?

Just this past December, the Court again addressed the issue of whether the Fourth Amendment protects privacy

rights, property rights, or both. In *Soldal v. Cook County, Illinois*, 113 S.Ct. 538, 544 (1992), the Court stated that the Fourth "Amendment protects property as well as privacy," and further held, *id.* at 544-45:

Respondents rely principally on precedents such as *Katz*, . . . , *Warden v. Harden*, . . . , and *Cardwell v. Lewis*, . . . to demonstrate that the Fourth Amendment is only marginally concerned with property rights. But the message of those cases is that property rights are not the sole measure of Fourth Amendment violations. The *Warden* opinion thus observed, citing *Jones v. United States*, . . . , and *Silverman*, that the "principal" object of the Amendment is the protection of privacy rather than property and that "this shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform." 387 U.S., at 304 There was no suggestion that this shift in emphasis had snuffed out the previously recognized protection for property under the Fourth Amendment. *Katz*, in declaring violative of the Fourth Amendment the unwarranted overhearing of a telephone booth conversation, effectively ended any lingering notions that the protection of privacy depended on trespass into a protected area. In the course of its decision, the *Katz* Court stated that the Fourth Amendment can neither be translated into a provision dealing with constitutionally protected areas nor into a general constitutional right to privacy. The Amendment, the Court said, protects individual privacy against certain kinds of governmental intrusion, "but its

protections go further, and often have nothing to do with privacy at all." 389 U.S., at 350

This is also clear from *United States v. Jacobsen*, 466 U.S. at 114, which held that a person who put his package in the hands of Federal Express, a private freight carrier, did not lose any privacy interest in the package to not be able to contest a search. See also *Walter v. United States*, 447 U.S. 649 (1980). This was also clear from *United States v. Place*, 462 U.S. 696 (1983), which reiterated the longstanding rule that a warrantless seizure is presumptively unconstitutional; *id.* at 701; and held that the 90 minute detention of Place's suitcase was a seizure under the Fourth Amendment even after a drug dog alerted on it. *Id.* at 707-09. The brevity of a seizure on reasonable suspicion may make it minimally intrusive, and therefore reasonable, if the police minimize the intrusion. *Id.*

3. Facts of this case

Again, the facts of this case demonstrate an objective expectation of privacy that society and the law clearly recognizes. Donald Simpson was a Customs official who owned the car the drugs were seized from. He had an integral part in the conspiracy, and he actually facilitated getting the cocaine across the border substantially because of his position as a Customs officer. As the courts below found, "he had a coordinating and supervisory role in the operation. He was a critical player in the transportation scheme who was essential in getting the drugs across the border." Pet.Cert. at 12a, 960 F.2d at 860. His wife, Maria Simpson, drove the car with the drugs from Mexico and turned it over to Xavier who, in turn, turned it over to Arciniega, his knowing agent, the driver who was stopped

by the Arizona state officer.⁷ She was the communication link between Xavier Padilla and the El Tejano group in Mexico which supplied it. She oversaw the operation from the Mexican end until the pickup in Tempe. *Id.* at 12a-13a, 960 F.2d at 860. Xavier Padilla was responsible for the purchase of the cocaine in Mexico and transportation through Arizona. He had ultimate responsibility for the cocaine at the time of the stop. He was the one to be called when the driver arrived at the Tempe motel. After the call (orchestrated by the DEA), he sent his wife and brother to pickup the shipment at the motel for the remainder of the trip. *Id.* at 13a, 960 F.2d at 860. These three thus were held to have standing. *Id.* at 14a, 960 F.2d at 860-61. The record as to the Xavier's wife and brother, Maria and Jorge, was insufficient to determine their role, so the case was remanded as to them. *Id.* at 14a-15a, 960 F.2d at 861. A sixth, Warren Strubbe, was held to have no standing because he had no control over the drugs after the driver drove away with them. *Id.* at 15a-16a, 960 F.2d at 861-62.

The Government concedes, as it must, that a traffic stop is a seizure. But, in this case, there is more. This stop is now conceded a "drug courier profile stop" without any pretext of reasonable suspicion or probable cause. It is presumptively violative of the Fourth Amendment. The

⁷ Appellee's Supplemental Excerpt of Record in the Ninth Circuit at 3. The Ninth Circuit's opinion states that Maria Simpson arranged for the drugs to be picked up in Mexico and travelled across the border keeping contact with the load. Pet. Cert. at 12a-13a, 960 F.2d at 860. She was in actual control of the shipment when it crossed the border, turned it over to the driver, and then monitored its movements thereafter.

Government earnestly argues it is nevertheless reasonable because it was minimal vis-a-vis the Simpsons and Xavier Padilla since they were not in physical possession at the time. This appears sound on the surface, but *amicus* submits that this completely overlooks the privacy interests involved.

Thus, the Government is on the horns of a necessary dilemma: It wants these people to be actively involved in the conspiracy so it can convict them. On the other hand, it must somehow mitigate these facts so it can try to overcome standing. This is a dilemma that defendants face when they raise standing; it is also a dilemma that the Government must face when it questions standing. Litigators face dilemmas like this all the time; it is how the system works. We seldom can have it both ways.

4. Property law and "common understandings"

Under the undisputed facts developed at the suppression hearing, the Simpsons and Xavier Padilla clearly had constructive possession and a privacy interest in the trunk of the car, so the decision of the court of appeals is correct.

Purely as a concept of property law, the Simpsons and Xavier Padilla had all the elements necessary for possession of the property even though they were not in actual, physical possession at the time of the seizure and search of the car. See 63A AM.JUR.2d *Property* § 37, at 268 (1984) ("One may have possession of a chattel, even in the absence of actual personal custody, if the chattel is under his control and in a place where it must have been put by his act or in his behalf, or where the chattel is within his power in such a sense that he can and does command its use."); 73 C.J.S. *Property* § 30, at 224 (1983) ("It is

sufficient if the person has the power and intent to control or exercise dominion over the property, directly or through another person."). There is a wealth of cases in 8A WORDS & PHRASES, *Constructive Possession* 582-83 (1951) & 194-200 (Supp.1992) stating that the elements of constructive possession are the ability and intent to control the disposition or use of personal property in the hands of another or one's agent acting at his direction.

This concept directly ties to the privacy concept. Here, they took all the normal precautions expected of anyone putting their car on the highway. The thing being transported was wrapped and concealed in the locked trunk of the car. It is every citizen's common understanding that the locked trunk of a car is free from prying eyes of the idly curious or the police and an illegal search, notwithstanding the lower expectation of privacy in a car.⁸ People commonly store all kinds of things in the trunk of their car even for day-to-day use. When traveling, all one's belongings for the trip will be in the car, locked in the trunk. People leave things in the trunk of the car overnight when they stop at hotels and motels, usually fearful only of a theft of the car by a criminal, not a prying open of the trunk, especially by the police. When the car is in the shop or the hands of a parking attendant, it is commonly understood that the locked trunk remains safe. Indeed, the bailee could be liable for a theft from the trunk if negligent in protecting the car or the keys. 8 AM.JUR.2d *Bailments* § 76, at 813-14 (Rev.ed.1980).

⁸ See, e.g., *Cardwell v. Lewis*, 417 U.S. 583, 590-92 (1974) (plurality opinion); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *California v. Carney*, 471 U.S. 386, 392 (1985); *New York v. Class*, 475 U.S. 106, 112-13 (1986).

Between an automobile user or owner and the Government, there still is and hopefully always will be an expectation that a vehicle will not be stopped arbitrarily and searched without cause. As the Court said in *Delaware v. Prouse*, 440 U.S. 648, 661-62 (1979):

An individual operating or travelling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971). Accord: *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). See *United States v. Ross*, 456 U.S. 798, 812-13 & n.17 (1982).

Therefore, a stop intrudes on the rights of all those with actual or constructive possession because their property or privacy rights have been invaded or compromised by

governmental action. As the Government set up the issue for this case, it admits that the stop of the car was arbitrary, unlawful, and without any justification whatsoever--a violation of the Fourth Amendment. If Jacobsen had standing challenge the search and seizure of his package consigned to Federal Express, why cannot these individuals involved in a sophisticated, hands-on conspiracy to import drugs in a vehicle not be able to do the same as to the vehicle?

III.

REFUSAL TO GRANT STANDING UNDER THESE FACTS WILL CAUSE WHOLESALE VIOLATIONS OF THE FOURTH AMENDMENT IN POTENTIAL CONSPIRACY CASES; THERE WILL BE NO DETERRENCE OF THE POLICE FROM VIOLATING THE FOURTH AMENDMENT IN THE NAME OF EFFECTIVE LAW ENFORCEMENT.

The scariest part of what could come from this decision is the clear and unmistakable message it will send to law enforcement: If the Government's position in this case is accepted by the Court, the Fourth Amendment will suffer a serious, and possibly fatal, blow. This runs more deeply than just deterring violations of the Fourth Amendment; the police will actually gain an incentive to violate the Fourth Amendment. The Government's position will easily and inexorably lead to police officers making grossly illegal highway stops to find drugs, knowing full well that the "mule" walks because of the illegal stop, but at least they have an opportunity to make a case against the "kingpin," as they here refer to Xavier Padilla.

The Government's own Brief, at 13, supports our

argument:

That principle is based on the Court's recognition that it would impose undue costs on the criminal justice system to permit an individual whose rights have not been violated to have the evidence against him suppressed. Because the exclusion of probative evidence "exact[s] a costly toll upon the ability of courts to ascertain the truth in a criminal case," *United States v. Payner*, 447 U.S. 727, 734 (1980), the Court has restricted application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." *Ibid.*, quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974). The Court has stated that it is "beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." *Payner*, 447 U.S. at 735. (citations omitted)

What about the even more costly toll on individual liberty? This is the heart of the matter.

The Government is unknowingly asking this Court to authorize a criminal justice system which inevitably will develop where vehicles are subject to seizure and search without any Fourth Amendment restriction whatsoever. If the driver of the car is the only one in on the deal, then he gets off, but at least insidious drugs are off the street. (See note 9, *infra*.) If, however, the driver has co-conspirators or leaders, the case against the driver is easily sacrificed so co-conspirators can be prosecuted to the maximum. The Government calls respondents' position "an unsupport-

ed and unsound rule that serves only to confer a Fourth Amendment windfall on defendants like respondents." Govt's Brief at 19. Rather, the Government's position will confer a Fourth Amendment windfall on it because the Fourth Amendment will be emasculated in vehicle searches and seizures. What this Court said twenty-five years ago in *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968), as to the reason for the exclusionary rule is still applicable today:

Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct. See *Weeks v. United States*, 232 U.S. 383, 391-393 (1914). Thus its major thrust is a deterrent one, see *Linkletter v. Walker*, 381 U.S. 618, 629-635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The rule also serves another vital function--"the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A

ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

This case involves much more than another possible "good faith exception" for a warrantless search--it actually connotes a legal *bad faith exception* to the warrant requirement--if the Government wins on this issue, bad faith law enforcement action will be rewarded.⁹ In *Alderman v. United States*, 394 U.S. at 175, this Court said: "We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect."

Will the police be deterred by a principled standing analysis that reaches co-conspirators? You bet they will. In a simple costs/benefits analysis, the Fourth Amendment must prevail. As Justice Brandeis said in *Olmstead v. United States*, 277 U.S. 436, 485 (1928) (BRANDEIS, J., dissenting):

Decency, security, and liberty alike demand that government officials shall be subjected to the

⁹ Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 436, 479 (1927) (BRANDEIS, J. dissenting) said:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill will, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

What crime would the government agent be committing? Why, violation of civil rights; 18 U.S.C. § 242; false imprisonment; Ariz. Rev. Stat. § 13-1303; or felonious restraint if a gun is drawn. See MODEL PENAL CODE §§ 212.2-212.3 (Proposed Official Draft 1962).

IV.

THERE IS NO "DRUG CASE" EXCEPTION TO THE FOURTH AMENDMENT.

At page 24-25 of its brief (Point C.2.), the Government argues what sounds a whole lot like it is asking the Court to adopt a "drug case" exception to the exclusionary

rule or maybe even the Fourth Amendment.¹⁰ In *United States v. Karo*, 466 U.S. 705, 717 (1984), the Court rejected such an attempt stating that "[t]hose suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses." (bracketed material added) All of the cases cited by the Government under this point of its brief, save *Brown*, have nothing to do with possession as an element of standing. See *United States v. Jacobsen*, 466 U.S. at 123 (a test which is designed to reveal whether a substance is cocaine reveals no "private" fact); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (warrantless seizure of imported box from defendant in front of house was valid after customs search revealed marijuana and police attempted controlled delivery but defendant left house with box before warrant arrived); *United States v. Place*, 462 U.S. at 707 (drug dog sniff is not a search).

¹⁰ At page 24 of its Brief, the Government argues:

Second, because respondents were not legally entitled to possess the cocaine, the detention or seizure of the cocaine could not deprive them of any lawful possessory interest in the drugs, "Congress has decided--and there is no question about its power to do so--to treat the interest in 'privately' possessing cocaine as illegitimate." *United States v. Jacobsen*, 466 U.S. at 123

CONCLUSION

Under the facts of this case, it is apparent that Simpsons and Xavier Padilla had an expectation of privacy in the car because of basic property law, privacy law, and understandings of society and, therefore, standing to challenge this search because of the nature of the relationship created between them. Adherence to the rule of law by the police in this country depends upon this Court engaging in a principled analysis of the expectation of privacy and standing in this case.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, AR 72201
(501) 371-9131

February 8, 1993

*Attorney for Amicus Curiae,
National Association of Criminal
Defense Lawyers*